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In the Supreme Court of the United States

OCTOBER TERM, 1978

BROADCAST MUSIC, INC., ET AL., PETITIONERS

v.

COLUMBIA BROADCASTING SYSTEM, INC.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL., PETITIONERS

v.

COLUMBIA BROADCASTING SYSTEM, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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No. 77-1583

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation of October 2, 1978.

QUESTION PRESENTED

Whether the method by which ASCAP and BMI license copyrighted musical compositions to the television networks for a fee that does not vary with actual music use is a *per se* violation of Section 1 of the Sherman Act.

STATEMENT

1. The American Society of Composers, Authors and Publishers (ASCAP) is an unincorporated association of some 22,000 authors, composers, and publishers who own copyrights in musical compositions (Pet. App. 26a).[1] ASCAP was formed as a clearinghouse in 1914 to deal with nonpayment for performances and other problems in the licensing of rights to perform musical works (*id.* at 25a-26a). ASCAP secures payment for members' copyrights and detects unauthorized uses of copyrighted music; it licenses users and makes indemnification against infringement charges readily available (*ibid.*). Members grant to ASCAP the nonexclusive right to license their works for nondramatic performances.[2] ASCAP, in turn, issues to users "blanket"[3] licenses

[1] "Pet. App." refers to the Appendix to the petition in No. 77-1578.

[2] A "nonexclusive" right is one that does not inhibit the member from issuing its own license for the same work. Performers thus may obtain licenses from ASCAP, from its members, or from both.

[3] A "blanket" license authorizes use of any or all compositions in the repertory, as often as desired, for the term of the license (Pet. App. 26a). The fee does not vary with the identity of the music used or with the number of uses.

to perform its entire repertory, which includes more than three million compositions (*id.* at 26a-27a). Royalties collected by ASCAP are distributed to its members according to "a schedule which reflects the nature and amount of the use of their music and other factors" (*id.* at 27a).

Broadcast Music, Inc. (BMI) was organized in 1939 by radio broadcasters, and it remains broadcaster-owned (Pet. App. 27a). It is affiliated with some 10,000 publishers and 20,000 writers, whose musical works are licensed by BMI through blanket licenses similar to ASCAP's (*ibid.*). BMI's repertory includes approximately one million works. Almost every domestic copyrighted musical composition is in either the ASCAP or the BMI repertory (*ibid.*).[4]

The licensing activities of ASCAP and BMI are regulated by consent decrees. Under the terms of a consent decree entered in *United States* v. *ASCAP*, 1950-1951 CCH Trade Cas. ¶ 62,595 (S.D. N.Y. 1950), members retain the right to license their works individually as well as through ASCAP (Para. IV(B); Pet. App. 31a-32a & n.4). ASCAP is required to "grant to any user making written application therefor a nonexclusive license to perform all of the compositions in the ASCAP repertory" (Para.

[4] There are several smaller performing rights societies, including one with approximately 300 publisher affiliates. See Note, *CBS* v. *ASCAP: Performing Rights Societies and the Per Se Rule*, 87 Yale L.J. 783 & n.1 (1978).

VI). The decree forbids ASCAP to grant "to any user a license to perform one or more specified compositions in the ASCAP repertory, unless both the user and member * * * shall have requested ASCAP in writing so to do" or the copyright owner cannot be located within 30 days (Para. VI).[5]

The decree permits ASCAP and licensees to negotiate any fee and any form of blanket license on which they can agree. It provides, however, that ASCAP must offer at least a "per program" blanket license, the fee for which would be based on income received for programs in which ASCAP music is played (Para. VII(B); Pet. App. 30a). The fees sought by ASCAP must offer a "genuine economic choice" between per program and other licenses, and ASCAP is restrained from "requiring or influencing the prospective licensee to negotiate for any other type of blanket license prior to negotiating for a per program license" (Para. VII(B)(3) and (C); Pet. App. 30a-31a).

On receipt of an application for a license, ASCAP must "advise the applicant in writing of the fee which it deems reasonable for the license requested."

[5] The rationale for requiring ASCAP to issue a blanket license and for prohibiting it, except in rare circumstances, from issuing licenses to specified compositions is discussed in Timberg, *Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950*, 19 Law & Contemp. Prob. 294 (1954). Where a user can identify the compositions it needs, it should deal directly with the copyright owners. Otherwise, ASCAP might be able to fix a price for such a license and eliminate competition among its members.

If the parties are unable to agree on a fee within 60 days of the filing of the application, the applicant "may forthwith apply to [the United States District Court for the Southern District of New York] for the determination of a reasonable fee" (Para. IX(A); Pet. App. 31a). In such a proceeding, ASCAP has the burden of establishing that the fee it seeks to charge is reasonable (*ibid.*).

A consent decree entered in *United States* v. *Broadcast Music, Inc.*, 1966 CCH Trade Cas. ¶ 71,941 (S.D. N.Y. 1966), is similar to the ASCAP decree in requiring BMI to offer alternative forms of and fee systems for blanket licenses (Para. VII(B)). Although other provisions of the BMI decree differ from those in the ASCAP decree,[6] the parties have stipulated that CBS could license directly from BMI affiliates with the same ease or difficulty as from ASCAP members (Pet. App. 32a-33a).

Copyright owners affiliated with either ASCAP or BMI thus retain the right to sell licenses for all uses—synchronization, dramatic performances or non-dramatic performances—and to keep all license fees so earned. They regularly license film and stage

[6] The BMI decree, for example, does not provide for the district court to set a "reasonable" fee at a user's request. It does not expressly reserve to affiliates the right to license their works directly. Only where a user is "making direct performances to the public" is individual negotiation required (Para. IV(A)). In view of the basic similarities of the two organizations, however, we will hereafter refer only to ASCAP with the understanding that, except as may be noted, our comments apply equally to BMI.

producers and certain independent television producers of programs for these uses (Pet. App. 67a-69a). Broadcasters are free to purchase such licenses from copyright owners, but typically they have not done so. Since 1946, CBS and the other television networks have continuously taken blanket licenses from ASCAP and BMI (Pet. App. 51a). The fees under these licenses are based on a percentage of the networks' total revenues and do not depend on the amount or distribution of music use (*id.* at 26a-29a). Until this suit was filed in December 1969, CBS had never sought any other form of license from ASCAP, BMI, or their members (*id.* at 50a-51a, 53a).

2. CBS brought this action to challenge the method by which ASCAP, BMI, and their members and affiliates license the nondramatic performing rights to their copyrighted musical repertories. CBS charged that the blanket license not keyed to specific songs actually used is unlawful because it "compels" CBS to pay royalties that are not based on actual music use (Pet. App. 33a). It argued that the pooling of licensing rights and the issuance of a blanket license are price fixing, unlawful tying, a concerted refusal to deal, and monopolization prohibited by Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2, and that these practices also constitute copyright misuse (Pet. App. 34a).

The district court severed liability issues from other issues in the case and, after a trial without a jury, dismissed the complaint. After holding that no *per se* violation existed, the district court viewed the

dispositive question under the rule of reason and copyright misuse law as one of compulsion: whether CBS is coerced into taking a blanket license (Pet. App. 39a, 114a). It found that CBS failed to prove the nonavailability of alternatives to the blanket license, and that, indeed, direct negotiation with individual copyrights owners is feasible (*id.* at 111a-114a).

The court of appeals affirmed the dismissal of all antitrust claims except one. The court recognized that the availability of alternatives to blanket licensing does not dispose of CBS's price-fixing allegations (Pet. App. 11a). Turning to this allegation, the court concluded that ASCAP and BMI are engaged in price fixing. The court based its conclusion on the fact that the payment a copyright owner receives from the blanket license fees collected by ASCAP and BMI is predetermined (*ibid.*). Thus, the copyright owner's "distributive share of the common royalties" is not the same as the payment it would receive in a free market, and, therefore, "is the result of at least the threshold elimination of price competition for the performing rights in" its music (*id.* at 11a-12a).

After concluding that ASCAP and BMI are engaged in price fixing, the court stated that because of "market requirements" price fixing is not always illegal (Pet. App. 13a). This "market necessity" defense is unavailable to ASCAP and BMI, the court thought, because alternatives to blanket licensing are

feasible (*id.* at 14a-17a).[7] Nevertheless, in remanding the case to the district court to consider relief, the court suggested that "the blanket license need not be prohibited in all circumstances" (*id.* at 21a-22a), because it "is not simply a 'naked restraint' ineluctably doomed to extinction" (*id.* at 22a). The court found that the record did not "compel a finding that the blanket license does not serve a market need for those who * * * deem [it] desirable" (*ibid.*). The court thought that existence of the blanket license created a disinclination on the part of members to compete in licensing individually, and it suggested that if ASCAP were "required to provide some form of per use licensing which will ensure competition among the individual members" objections to the current blanket license would be removed (*ibid.*).[8]

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[7] The court relied on this finding to distinguish *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), cert. denied, 389 U.S. 1045 (1968), in which the Ninth Circuit concluded that ASCAP was not engaged in price fixing. The parties in that case had stipulated that there were no practical alternatives to blanket licensing (Pet. App. 14a).

[8] Judge Moore concurred in the result but stated that he did not believe the ASCAP blanket license to be price fixing (Pet. App. 23a). He later elaborated, in an opinion explaining his vote to deny rehearing, that, in his view, the record did not permit a finding that there was no "market need" for the blanket license, and he stated that on remand the district court should consider "proof and/or argument of the effect on price competition of the blanket license and some form of per use license" (*id.* at 125a).

SUMMARY OF ARGUMENT

The traditional standard for determining whether an agreement violates Section 1 of the Sherman Act is the rule of reason, a standard which requires an economic inquiry into the effect of the agreement on competition in the relevant market, the purpose of the agreement, the percentage of the market affected by it, and similar factors. The rule of reason is not applied, however, when the restraint is price fixing, because price fixing is a naked restraint with no purpose other than to restrain competition. It is thus better to declare the entire category of price fixing illegal *per se* than to inquire into its actual anticompetitive impact on a case by case basis.

A price-fixing agreement is an agreement among competitors to charge a particular price, manufacture a particular quantity, adjust the terms of competition, or otherwise tamper with the price-setting mechanism of the marketplace. Such agreements are unlawful no matter how reasonable the price set may be, no matter how ruinous competition otherwise may be, and no matter how legitimate the association otherwise may be. But an agreement among competitors to market a product or service fundamentally different from anything any of them individually can market has never been found to be price fixing under circumstances where, as here, there is no agreement not to sell the individual products or services at any price the competitors choose, and where the project is not a disguise for price fixing.

As the case of mergers illustrates, not every species of agreement among competitors that somehow has an effect on price is *per se* illegal. The Court has been careful to examine each species of restraint, usually after experience with it, before determining whether it should be categorically deemed unlawful.

Several considerations preclude a determination that the agreement to market a blanket copyright license is *per se* unlawful. ASCAP's blanket license is a distinctive product, fundamentally different from any license any one of its members can sell. The licensee obtains the privilege to use any or all of millions of works, whereas any individual member of ASCAP could license only the privilege to use a relatively small number of compositions. The blanket license, moreover, provides immediate access to music as soon as it is written, provides flexibility in making last-minute programming changes, and provides broad indemnification against infringement suits and competing claims for the use of the same work. The blanket license also saves enormous costs that would otherwise be required to transact the purchase of individual licenses for single performances, especially in the case of music users such as radio stations that frequently play music.

If such a comprehensive product, with its offer of savings, is to be available at all, it must be assembled and marketed through a society such as ASCAP, and the members of the society necessarily must agree on the price at which the product is to be sold. Such an agreement to market a new product or service is

not illegal *per se* under Section 1 even though the parties set its price, because the agreement on the price is essential if the new product or service is to be sold at all.

A different question would be presented if ASCAP's members agreed that they would set the prices at which they could individually sell licenses, or that they would only sell through the blanket license. Such agreements would not be essential to the enterprise of marketing the blanket license. In the present case, however, no such restriction exists, and each member is free to sell licenses to its own music at whatever price it can negotiate. Thus, rather than restricting the choice available to the user, the blanket license offers an additional choice: the user may negotiate individual licenses or purchase a blanket license.

None of this is to say that the blanket license or certain of its features, as applied to television networks, could survive the scrutiny of the rule of reason. It is to say, however, that the court of appeals was in error in holding the blanket license to be *per se* illegal merely because a price is necessarily set in the course of marketing a product fundamentally different from any that any member of ASCAP could offer.

ARGUMENT

THE BLANKET LICENSES ISSUED BY ASCAP AND BMI ARE NOT UNLAWFUL *PER SE*

CBS has waged a broad-ranging campaign against the licensing procedures used by ASCAP and BMI. In the district court, CBS argued that the pooling and collective licensing of copyrights is a form of tie-in that is unlawful because ASCAP and BMI have considerable market power and "coerced" CBS to take blanket licenses. CBS also argued that the licensing arrangements violate antitrust principles under the rule of reason. The district court rejected these contentions, in a lengthy opinion (Pet. App. 24a-121a), after holding a trial that lasted eight weeks.

The focus of CBS's presentation changed on appeal. CBS argued (brief on appeal at 20) that "[t]his case should have been decided on the basis of the fact that [ASCAP and BMI] are selling at fixed prices." Because price fixing is unlawful *per se*, CBS argued that "it is unnecessary in law to consider what the impact of that arrangement [is]" (*id.* at 21). The court of appeals agreed with this position and held that the licensing arrangements are unlawful without reference to their economic effects (Pet. App. 11a-21a). Although the court stated that even facially unlawful arrangements might be approved if price fixing were the only possible way to organize a market (*id.* at 14a-16a), it concluded that television networks could obtain licenses direct from copyright

owners, so that there is no necessity for blanket licensing.

The court of appeals' disposition of this case turns squarely on its conclusion that blanket licenses are a form of price fixing, which is unlawful regardless of its economic effects in particular cases. The single issue before the Court, therefore, is whether blanket licensing is so plainly anticompetitive that detailed factual inquiry is unnecessary. For the reasons stated below, we believe that blanket licensing is not unlawful *per se*, and that the propriety of the procedures used by ASCAP and BMI must be evaluated under the rule of reason. Because the court of appeals did not evaluate blanket licensing of television networks under the rule of reason, this Court need not do so, and the United States takes no position on what the outcome of such an evaluation should be.

A. An Arrangement Is Unlawful *Per Se* Only If It Is Part Of A Class Of Arrangements That Is Demonstrably Anticompetitive

Although the Sherman Act, read literally, prohibits all multiparty restraints of trade, this Court has held that it precludes only agreements that are "unreasonably restrictive of competitive conditions." *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1, 58 (1911); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 690 (1978). Whether a restraint is "unreasonable" depends on its effect on competition in the market, the purpose of the restraint, the percentage of the market affected and similar conditions. *Chicago Board of Trade* v. *United*

States, 246 U.S. 231, 238 (1918); *National Society of Professional Engineers* v. *United States*, *supra*, 435 U.S. at 688-692. Some categories of restraints, however, are so clearly anticompetitive that repetitive inquiries into their reasonableness in case after case are not worthwhile. It is better to declare the entire category of restraints unreasonable *per se*, not only to avoid exhaustive market assessments in every case but also to provide clear guidelines for antitrust compliance. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 609-612 & n.10 (1972); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977).

An agreement among competitors to charge a particular price, manufacture a particular quantity, adjust the terms of competition, or otherwise tamper with the price-setting mechanism of the marketplace is unlawful *per se*, no matter how reasonable the price set may be, no matter how ruinous competition otherwise may be, and no matter how legitimate the association otherwise may be.[9] But this Court has never found an agreement among competitors to

[9] *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 331-332, 342 (1897); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 233 (1940); *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485 (1950); *Citizens Publishing Co.* v. *United States*, 394 U.S. 131, 135 (1969); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 781-782 (1975); *National Society of Professional Engineers* v. *United States*, *supra*; *United States* v. *Addyston Pipe and Steel Co.*, 85 F. 271, 282-283 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899).

market a product or service fundamentally different from anything any of them individually could possibly market to be price fixing under circumstances where no agreement is made to prevent any of them from continuing to sell their individual products or services at any price they choose, and where the project is not a disguise for price fixing.

In the mine run cartel case, in which otherwise independent competitors agree to change prices or the terms of competition, the agreement imposes significant costs on society. An increase in price is accompanied by a decrease in production, as buyers seeks substitute products. This substitution diverts resources away from their most productive use and reduces the efficiency of the market.[10] Where there are economies of scale, the inefficiency is compounded because each member of the cartel cuts back on production at the margin, where production is least costly. In most cases of cartelization the average cost and the marginal cost of producing a particular item thus rise, again to society's detriment.[11] Moreover, it has been suggested that the prospect of obtaining monopoly profits leads members of the cartel to devote resources to "monopolizing"—that is,

[10] For general discussions of the costs of cartels and price fixing, see II P. Areeda & D. Turner, *Antitrust Law* ¶¶ 401-405 (1978); R. Bork, *The Antitrust Paradox* 90-160 (1978); R. Posner, *Antitrust Law: An Economic Perspective* 8-22, 237-255 (1976).

[11] See Areeda & Turner, *supra*, at ¶ 405.

to invest time and money in forming the cartel and in obtaining a larger share of the monopoly profits.[12]

But not everything that affects price creates the damages discussed above, and therefore not every joint or collaborative action that may affect price is unlawful *per se*. Many things may affect price: a merger between competitors, the exchange of economic information, joint research or exploration ventures, and so on, may have significant effects on the market. But each of these events by itself, despite the effect on competition, is not unlawful *per se*: mergers may have offsetting efficiencies, joint research or exploration may be beneficial. The Court has been careful to scrutinize each species of competitive behavior claimed to be unlawful to ascertain whether it is so likely to be anticompetitive—so likely to produce the varieties of inefficiency and waste discussed above—that the courts should decline to inquire whether a particular example of the species has all of the attributes that make the species itself anticompetitive. We turn to that inquiry.

B. Performing Rights Societies Are Not "Naked Restraints," And So A Detailed Inquiry Into Their Competitive Consequences Is Necessary

ASCAP undoubtedly is an association composed of persons who otherwise are competitors. It offers a

[12] In some cases, it has been argued, the competitors could dissipate the entire monopoly profit in this way, leaving the industry with higher costs and no discernible supracompetitive return. See Posner, *supra*, at 11-14; Posner, *The Social Costs of Monopoly and Regulation*, 83 J. Pol. Econ. 807 (1975).

license at a cost set by ASCAP, and in so doing alters the circumstances under which copyrights are available in the marketplace. The arrangement challenged here thus has important features in common with other arrangements that, this Court has held, are *per se* illegal. The court of appeals' analysis went no further. We submit, however, that performing rights societies, and blanket licenses for copyrighted works, do not invariably produce inefficiencies and waste of the sort that should lead to automatic condemnation. This is so for two reasons: first, the blanket license is a product that no copyright owner could offer by itself; second, ASCAP achieves substantial efficiencies that are directly beneficial to music users as well as composers.[13]

1. *The blanket license is a unique product.*

What ASCAP sells is fundamentally different from any license any one of its members can sell. Each member of ASCAP owns relatively few copyrights. Although some users, such as stage and film producers, may purchase all the rights they need directly from the copyright owners, other users of music—such as radio stations and restaurants—prefer an altogether different license that "blankets" millions of songs owned by thousands of copyright owners. No single copyright owner is able to sell such a blanket license.

[13] We do not argue that the consent decrees entered in the government's suits against ASCAP and BMI "disinfect" their activities; the decrees are not material to the antitrust analysis of the blanket licenses. See Pet. App. 18a-19a.

By pooling their three million compositions, the members of ASCAP are able to market a blanket license. The blanket license benefits users by providing: (1) broad indemnification against infringement suits and protection against competing claims for the same work; (2) immediate access to works as soon as they are written; and (3) flexibility in making last-minute programming decisions, because all music in the repertory is automatically covered by the license. The blanket license serves users' legitimate business needs that cannot be served by individual copyright owners. The individual copyright owners, moreover, retain the right to sell per use licenses as they please.

In agreeing to include their works as part of a general license, members necessarily must authorize ASCAP to negotiate a fee, and the members must agree on how it shall be divided. Whether members set per use fees for their work, whether they agree to share in a percentage of a flat fee, whether their receipts are higher or lower than direct licensing would yield, the fact remains that a blanket license is impossible without some form of agreement on what the licensee will pay and how it shall be divided.

Were this a case of an agreement among copyright owners to establish minimum prices for their individual licenses or to establish a sham organization for the same purpose, it would undoubtedly be unlawful *per se*. But the combination of copyright owners to offer a unique product adds to the options available in the market, in a way that a simple

cartel does not. This Court has never held that an agreement among competitors to market a product or service fundamentally different from anything any of them could possibly market individually is unlawful *per se*. Indeed, the Court's statements over the years (albeit in *dicta*) recognize that, so long as the competitors do not also fix prices on their individual products or services, the agreement to set a price on the new product or service is not illegal *per se* because such an agreement is essential if the new product or service is to be offered at all.[14]

For example, the antitrust laws, as Judge Taft observed in *United States* v. *Addyston Pipe and Steel Co.*, 85 F. 271, 280 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899), tolerate the restraint on competition between partners resulting from partnership agreements because the restraint is incident to the main purpose to carry on a successful business. In the present case, it is unnecessary even to go that far, for the district court found no agreement among ASCAP members preventing them from licensing their individual works as they please (and, in fact, as they do for film and stage performances and television synchronization rights (Pet. App. 67a-68a)). The only restraint respecting price is incident to and

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[14] *E.g.*, *United States* v. *Trans-Missouri Freight Association*, *supra*, 166 U.S. at 329; *United States* v. *Joint Traffic Association*, 171 U.S. 505, 567-568 (1898); *Standard Oil Co. (Indiana)* v. *United States*, 283 U.S. 163, 174-175 (1931); *United States* v. *Addyston Pipe and Steel Co.*, *supra*, 85 F. at 281, aff'd, 175 U.S. 211 (1899). See also *Chicago Board of Trade* v. *United States*, *supra*, 246 U.S. at 238; *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964).

essential to the marketing of a blanket license distinctly different from any license any individual alone could sell.

2. *Blanket copyright licensing saves the costs of transacting for individual copyrights and of enforcing the owner's rights.*

Many users of copyrights play music constantly. Some radio stations, for example, play music around the clock; they may need access to 20 or more copyrighted songs every hour. The costs of negotiating with each copyright owner could be substantial. Moreover, because thousands of radio and television stations may use copyrighted music, the owners of copyrights, acting by themselves, have no feasible means of detecting unauthorized uses. The costs of entering into licenses as needed, and of enforcing the owners' rights against many unknown potential users of music, were the impetus underlying the formation of ASCAP.[15]

Performing rights societies thus are valuable in reducing the costs that would be associated with multiple transactions and with enforcement. The costs of transactions could be formidable. Prospective users of music would need to enter into a separate license for each song. Copyright owners would need to gather information about the identity of the buyer and the nature of the proposed use in order to know what price should be sought for a license. In many cases the costs of finding the copyright

[15] See generally Note, *supra*, 87 Yale L.J. at 784-786.

owner and negotiating a license would exceed the value, to the user, of any particular piece of music. It has been estimated that the nation's television and radio stations perform ASCAP music more than one billion times annually; [16] the costs of negotiating separate licenses for each performance would be astronomical.[17]

The considerations we have set out above distinguish blanket licenses offered by performing rights societies from ordinary cartels.[18] We do not say that

[16] J. Dean, *The ASCAP Survey: Its Design and Objectives* 1 (1963), unpublished pamphlet cited in Note, *supra*, 87 Yale L.J. at 786 n.25.

[17] CBS has argued that blanket licensing of network performances is unnecessary because the value of the music to it far exceeds the cost of individual transactions and because copyright owners easily could detect unlicensed network performances. We do not dispute these factual assertions, but it does not follow that the special circumstances of CBS and the other networks should affect the analysis of this case. Whether a particular species of conduct is unlawful *per se* should depend, as we have emphasized, on the necessary tendency of its competitive consequences. That is why, once the *per se* rule has been invoked, defendants cannot justify their conduct by pointing to a particular benefit it may produce in a particular case. The *per se* rule cuts off such lines of inquiry. Similarly, a plaintiff should not be able to take a species of conduct, ordinarily subject to the rule of reason, and subject one application to it to *per se* analysis on the argument that the usual benefits of the species do not obtain in a particular application. The argument that particular circumstances -ap conduct of its justification should not be the source of a rule of *per se* illegality; it should be, instead, a pertinent consideration for analysis under the rule of reason.

[18] Because of the considerations discussed in the text, blanket licensing of copyrights is not unlawful *per se*. It is

any of the considerations, standing alone, necessarily would be sufficient. Our point, rather, is that these things coalesce. The blanket license offers a new product that yields substantial direct savings for copyright users and copyright owners alike. The blanket license therefore is not a species of collaboration so obviously anticompetitive, in the run of cases, that the circumstances of particular cases should be ignored. It is not unlawful *per se*.[19] That is the point

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therefore unnecessary for this Court to consider the suggestion of the court of appeals (Pet. App. 14a-16a) that a "market necessity" defense may be available in some cases despite a finding of unlawfulness *per se*. Although the court of appeals relied on the brief for the United States as *amicus curiae* in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), cert. denied, 389 U.S. 1045 (1968), as the basis for this suggestion, we believe that the court has misread that brief. The United States did not argue that blanket licenses are unlawful *per se* but that some form of defense is nonetheless available; it argued, instead, that blanket licenses serve a valuable economic function and therefore should be evaluated under the rule of reason. In *K-91* itself, the brief argued, the record showed the blanket license to be lawful under a rule of reason analysis. (Because of the dispute that has arisen concerning the interpretation of that brief, we reproduce it as an appendix to this brief.)

At all events, we submit that there could be no acceptable "market necessity" defense to activity that is unlawful *per se*. The reason for having *per se* rules is that it is necessary, at some point, to cut off further inquiry and to lay down clear principles that will govern even if they do not precisely fit some particular case. It is not possible to entertain a "market necessity" defense without discarding the idea of cutting off inquiry, that is, without discarding the idea of *per se* rules.

[19] Petitioners raise for review the court of appeals' apparent conclusion (Pet. App. 23a n.29) that the blanket license amounts to copyright misuse under Section 1 of the Sherman

of the distinction made by Judge Taft in *Addyston Pipe* between naked restraints, which are unlawful *per se*, and restraints involving partial integration, such as partnerships, where the arrangement among competitors holds out strong promise of economic efficiency.

C. It May Be Appropriate For The Court Of Appeals To Give Further Consideration To The Lawfulness Of Blanket Licensing Under The Rule Of Reason

At the risk of repeating what is clear, we emphasize that our discussion does not indicate approval of the blanket licensing system as applied to television networks. The blanket licenses must be evaluated under the rule of reason, which the court of appeals did not do. This Court need not decide, and we therefore have not discussed, that rule of reason issue.

As the lengthy litigation between the United States and the performing rights societies indicates, however, blanket licensing may raise serious antitrust problems. It is troubling, for example, that there are only two large performing rights societies.[20] This may

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Act. Because the court of appeals' holding in this regard depends entirely on its conclusion that blanket licenses are unlawful *per se*, there is no reason for this Court to give separate consideration to the question.

[20] The suggestion in the brief of Aaron Copland, *et al.*, as *amici curiae* that performing rights societies are no different, in any economic sense, from law firms therefore is unpersuasive. Ordinarily a market for legal services contains more than two law firms; a merger of every law firm in Washington, D.C., would raise serious antitrust questions under the

create opportunities for collaboration and oligopolistic behavior. It may be, too, that the economic benefits of blanket licensing do not pertain to certain users, so that the justification for collaboration among copyright owners is correspondingly reduced.[21] Moreover, blanket licenses may initially be so attractive that individual licenses all but disappear. Then music users could be caught in a position that gives performing rights societies, and their members, substantial opportunities to misuse their economic position.

Because television networks have a blanket right to perform any copyrighted work, the producers of television shows and movies need not obtain, at the time of production, any performance rights. They typically obtain only the right to synchronize the music with the other material in the show; it would be wasteful for the producer to obtain a broadcast right that the network already possesses (Pet. App. 66a). Networks and individual television stations accumulate substantial inventories of shows and movies "in the can." If they were to discontinue the blanket license, they then would be required to obtain performance rights for these already-produced shows. This attempt would create an opportunity for the copyright owners, as a condition of granting performing rights, to attempt to obtain the entire value of the shows "in the can." It would produce, in other words,

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rule of reason that cannot be answered as easily as *amici* suggest.

[21] See note 17, *supra*.

a case of bilateral monopoly.[22] Because pricing is indeterminate in a bilateral monopoly, television networks would not terminate their blanket licenses until they had concluded an agreement with every owner of copyrighted music "in the can" to allow future performance for an identified price; the networks then would determine whether that price was sufficiently low that termination of the blanket license would be profitable. But the prospect of such negotiations offers the copyrights owners an ability to misuse their rights in a way that ensures the continuation of blanket licensing despite a change in market conditions that may make other forms of licensing preferable. Whether such abuse would occur is difficult to know; CBS has never sought to negotiate with copyright owners for future performing rights for music "in the can." But the possibility certainly exists.[23]

There are other ways, which need not be recounted here, in which market arrangements (such as blanket

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[22] See *National Broiler Marketing Association* v. *United States*, No. 77-117 (June 12, 1978) (White, J., dissenting); G. Stigler, *The Theory of Price* 207-208 (3d ed. 1966).

[23] The district court found that the owners of copyrights on music "in the can" would not coerce CBS if it sought to obtain performing rights, and the court of appeals held that this finding is not clearly erroneous (Pet. App. 8a-10a). The district court's findings, however, addressed what was essentially a tie-in argument; the court did not consider the possibility that the copyright owners' self-interested, non-coercive demands for compensation might nevertheless make the cost of CBS's dropping the blanket license sufficiently high that ASCAP and BMI could take this "termination penalty" into account in setting fees for the blanket license.

licensing), although offering theoretical benefits to the economy, may become anticompetitive over time. These possibilities are appropriately addressed under the rule of reason. Because the court of appeals did not consider any rule of reason arguments, they would remain open on remand from this Court, if CBS has properly preserved them. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975); *Ramsey* v. *United Mine Workers*, 401 U.S. 302, 312-314 (1971).

As we read CBS's briefs in the Second Circuit, however, CBS relied entirely on a *per se* price-fixing theory. If that is the proper interpretation of its briefs, then the appropriate disposition of this case is to reverse the judgment of the court of appeals and remand for reinstatement of the district court's judgment. Cf. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 215 (1976); *Chicago Board of Trade* v. *United States, supra*, 246 U.S. at 238, 241. We take no position on whether this is the appropriate disposition.[24]

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[24] The Court also might consider remanding the case so that the court of appeals could determine what issues were properly raised before it.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it holds that blanket licenses of copyrights are *per se* violations of the antitrust laws.

Respectfully submitted.

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NOVEMBER 1978

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 147

K-91, INC., PETITIONER

v.

GERSHWIN PUBLISHING CORPORATION, ET AL.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

On October 9, 1967, this Court invited the Solicitor General to express the views of the United States on this case. This memorandum is filed in response to that request.

STATEMENT

This is an action for infringement of the copyrights on some 183 recorded musical compositions

(F6).[1] Respondents, the owners of the copyrights, sued petitioner, a corporation operating radio station KIXI in Seattle, Washington. In 1961 and 1962, that station gave public performances for profit of the compositions by broadcasting recordings of them without paying any royalties and without the owners' consent (F2, 3, 4, 6, 7).[2] Some of the defendant radio stations have been engaged in such a practice for at least 10 years (F8).

Petitioner admitted the infringement of the copyrights, but defended on the ground that respondents could not maintain their suit because, as members of the American Society of Composers, Authors and Publishers ("ASCAP") they had formed an unlawful conspiracy in violation of the antitrust laws[3] which was engaged in price-fixing and block-booking of its members' works (Pet. App. 5, 13). It counterclaimed, seeking treble damages and an injunction against further renewal of the copyright (Pet. App. 14).

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[1] "F" refers to the Findings of Fact made by the District Court.

[2] Suits were also filed against two other Washington corporations operating radio stations and an individual officer of one of them. However, these defendants did not appeal from the district court's adverse ruling.

[3] Petitioner also asserted that respondents had violated laws of the State of Washington governing copyright protection (Chapter 19.24 R.C.W.), and were barred from relief by the "unclean hands" doctrine because they had unlawfully extended their individual copyright monopoly. Neither of those issues is presented in the petition for certiorari.

ASCAP is an unincorporated membership association of some 8,000 authors, composers, and publishers who own copyrights in various separate musical compositions (F16). It licenses these works for non-dramatic public performances (F18). ASCAP's musical repertory, which is constantly changing as new copyrights are added and old copyrights expire (F23), includes more than one million works (Pet. App. 6).

Each respondent in the instant case has granted ASCAP the non-exclusive right to license its works for non-dramatic public performances for profit (F21). This licensing activity is regulated and controlled by a consent decree entered in *United States* v. *ASCAP*, S.D.N.Y., Civ. No. 13-95[4] (Br. in Opp. App. 1a-17a). As pertinent here, the decree requires ASCAP to "grant any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory" (Par. VI). However, the decree forbids ASCAP from granting "to any user a license to perform one or more specified compositions in the ASCAP repertory, unless both the user and member * * * shall have requested ASCAP in writing so to do * * *" or the composer cannot be located within 30 days (Par. VI). Upon receipt of an application for a license, ASCAP is required to "advise the applicant in writing of the fee which it deems reasonable for the license requested." ASCAP must avoid discrimination in fees (Par. VIII), and must offer comparable fees to all

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[4] CCH Trade Cases, 1950-1951, ¶ 62,595.

applicants similarly situated (Par. IX(C)). If the parties are unable to agree upon a mutually acceptable fee within 60 days of the filing of the application, the applicant "may forthwith apply [to the District Court for the Southern District of New York] for the determination of a reasonable fee * * *" (Par. IX). In such a proceeding ASCAP has the burden of establishing that the fee it seeks to charge is reasonable (Par. IX).

In addition, the 1950 consent decree forbids ASCAP from charging license fees for commercial programs which are based upon a percentage of income from programs not including ASCAP compositions, unless the broadcaster desires such a license (Par. VII(A)). It also requires ASCAP to offer per program licenses for commercial programs for a flat fee or for a percentage of revenue from the program in which ASCAP music is played (Par. VII(B)). ASCAP must offer "a genuine economic choice between per program and blanket licenses" to stations with relatively few commercial announcements, and is restrained from influencing the licensee to negotiate for blanket licenses prior to negotiating a per program license (Par. VII (B) and (C)).

For radio stations located in the State of Washington a special arrangement under the decree was established in a consent order.[5] The order provides for

[5] This order resulted from differences between ASCAP and certain Washington broadcasters concerning the effect of a Washington State statute, R.C.W. 19.24, which makes it unlawful for combinations of copyright holders to issue licenses

two types of licenses: A blanket radio license and a per program radio license. Both licenses grant the licensee the right to perform any composition in the ASCAP repertory. The blanket license fee is 2.125 percent of the licensee's overall revenues from sale of time on the air, after certain deductions. The per program license fee is 8 percent of the gross revenues derived from the particular programs in which ASCAP compositions are performed (F38-45; Pet. 8).

Petitioner has never applied for either form of license; nor has it ever sought any other kind of license (F48). Since ASCAP's licenses are nonexclusive, respondents also have the right individually to license their works on any basis, per piece or otherwise, which is mutually agreeable to applicants and themselves. Petitioner has never attempted to obtain such a license (F50-51).

The parties stipulated that it would be virtually impossible for broadcasters and copyright holders to arrange separate licenses and payments for each performance on radio of a copyrighted composition (R. 30, Agreed Fact 50). And the district court found that a central licensing agency such as ASCAP is the only practical way that copyright proprietors may enjoy their rights under the federal copyright laws and that broadcasters and others may conveniently obtain licenses for the performance of copyrighted music (F25). It found that single copy-

in the State of Washington for the right of public performance of their copyrighted works, except on a per piece basis (see Br. in Opp. 11-15; F38-45).

right owners cannot deal individually with all users or individually police the use of their songs (F25); and that a single radio station may broadcast as many as 60,000 performances of recorded musical compositions per year involving as many as 6,000 separate compositions (F11-12).

The district court concluded that the defendant radio stations had infringed the respondents' copyrights and that petitioner's defenses and counterclaims under the antitrust laws were without merit (Conclusions of Law 2, 15).[6] On appeal by petitioner, the Court of Appeals for the Ninth Circuit affirmed (Pet. App. 26, 27). The court held that no issue was presented as to whether the decree immunized ASCAP from further prosecution for violation of the antitrust laws. It determined, however, that ASCAP was not a combination in restraint of trade or a monopoly within the meaning of the Sherman Act. Noting that when an applicant claims that ASCAP's fee is unreasonable, the court which entered the consent decree can be asked to fix the fee, the Ninth Circuit concluded that ASCAP cannot fix prices because "so long as ASCAP complies with the decree, it is not the price fixing authority," and indicated its disagreement with the view "that the danger of unreasonable activity that might arise from ASCAP's activities makes everything that it does a violation of the antitrust laws, when those of its potential activi-

[6] Petitioners and ASCAP have entered into a retroactive license agreement which as extended runs from January 1, 1959, to December 31, 1967 (Br. in Opp. 15).

ties that might have this effect are prohibited by the decree" (Pet. App. 18). In addition, the court concluded that because ASCAP's licensing authority is not exclusive and prospective licensees may therefore seek individual arrangements with individual composers, the activities disclosed by the record did not violate the antitrust laws (Pet. App. 19).

DISCUSSION

In substance, the question presented by the present petition is whether the bulk-licensing methods by which ASCAP's members market rights to perform publicly for profit recordings of their copyrighted musical compositions violate the antitrust laws. The court of appeals concluded that no antitrust violations were shown, after finding "that as a potential combination in restraint of trade, ASCAP has been 'disinfected' by the decree" (Pet. App. 18), and pointing out that music users may make individual arrangements with separate copyright holders if they wish, instead of dealing with them through ASCAP. In the limited context of this case—the licensing of performance rights for broadcast by radio of recorded compositions—the result below, in our view, seems correct, and review by this Court would not appear to be warranted.

We do not understand the court below to have held that the consent decree now in force against ASCAP of itself makes lawful what would otherwise be unlawful (see Pet. App. 17-18). To the extent that

ASCAP's activities, whether under the consent decree or unregulated, violate the antitrust laws, both the United States and private parties have a continuing remedy under the Sherman Act. Nothing in the holding below is to the contrary.

The existence and operation of agencies which collectively license the right to perform musical works raise difficult problems under the antitrust laws. See, *e.g.*, *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888 (S.D.N.Y.); *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn.); *Affiliated Music Enterprises* v. *SESAC Inc.*, 60 F. Supp. 865, 875 (S.D.N.Y.). Since the musical works of copyright holders compete with each other, a combination of these holders through use of a common selling agency is subject to charges of illegal pooling and price-fixing. But the Sherman Act does not affect all situations in the same way. Thus, even though the antitrust laws apply with full force and effect to collective licensing agencies such as ASCAP, account must be taken of the mutual interests of copyright holders and of music users, and which enables the marketing of performing rights for recorded music to be effectively accomplished.

The Sherman Act has always been discriminatingly applied in the light of economic realities. There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities, subject to strict limitations under the antitrust laws to guarantee against abuse of the collective

power thus created. *Associated Press* v. *United States*, 326 U.S. 1; *United States* v. *St. Louis Terminal*, 224 U.S. 383; *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344; *Chicago Board of Trade* v. *United States*, 246 U.S. 231. This case appears to us to involve such a situation. The extraordinary number of users spread across the land, the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year,[7] the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music.

If this market is to function at all, there must be—at least with respect to licensing the performance of recorded music—some kind of central licensing agency by which copyright holders may offer their works in a common pool to all who wish to use them. ASCAP's repertory includes a large percentage of the nation's copyrighted music. This results in a situation which can lead to abusive discriminations among users, if not effectively regulated. Thus, it is quite reasonable to require ASCAP to offer the same terms to all users similarly situated. And because users' requirements for separate pieces are continuous, the volume of demand enormous, and

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[7] Individual stations broadcast thousands of playings of musical compositions each year, and ASCAP has in excess of one million musical compositions in its repertory at any one time (see Pet. App. 6).

the value of each single performance small, separate negotiations on a per piece basis are not practicable. There is simply no escaping, as a practical matter, the licensing of the works in bulk. Although bulk licensing must thus be tolerated, the opportunity to make separate arrangements directly with the individual copyright holder should also be preserved for those who might be able to take advantage of it. Therefore, the right to license in bulk delegated to the collective agency must be non-exclusive, so that users have the option of choosing a blanket license or negotiating with individual copyright holders. Cf. *United States* v. *Paramount Pictures*, 334 U.S. 131, 159. These are, of course, some of the central terms of the government's present consent decree against ASCAP.

Petitioner maintains that individual arrangements are simply not practical (Pet. 17). We agree that in most, if not all, instances this is true.[8] But this simply reinforces the justification for a blanket licensing system. Indeed, petitioner seems to suggest that ASCAP might constitute a lawful arrangement if it offered a greater variety of license packages, for example, western, religious, rock, classical, etc. (Pet. 7). Thus, petitioner concedes that the issue is not the validity of ASCAP's existence in the field of licensing recorded music, or the legitimacy of its bulk licensing as such in this field, but rather the size of the package ASCAP offers.

[8] Broadcasters with special needs may find it feasible to deal directly with publishers.

Alternatively, petitioner argues that its objections might be avoided if ASCAP were required to negotiate licenses with recording companies so that the performance rights would be sold at the source, *i.e.*, anyone acquiring ownership of the record would also own the right to perform it publicly for profit.[9] But there is nothing in the record to indicate that recording companies have ever sought such rights, that they have any economic incentive to do so, or that ASCAP has ever attempted to prevent them from obtaining such licenses. The reasons for this readily suggest themselves. Such companies earn their income from the sale of recordings, not from the public performance of the recording for profit. Moreover, the value of the performing right for a single song cannot be determined until it has been exposed to the public and the extent of demand for its playing can be assessed. Finally, since the same record may be used at home or in the broadcast studio, the price of the performing right would be reflected in the price of the record sold to the general public, thus requiring the record-buying public to subsidize the operating

[9] Such an arrangement has been adopted under the ASCAP decree with respect to the performance of music incorporated into the sound track of motion pictures distributed to movie exhibitors. Prior to 1948 ASCAP required exhibitors to obtain a license from it in order to play the music on the sound track of films they had rented. The 1950 amendment to the decree forbade this, thus requiring ASCAP to negotiate with the motion picture producers a license for public performance of the music which would operate to the benefit of anyone renting the film. See Timberg, *The Antitrust Aspects of Merchandising Modern Music*, 19 Law & Contemp. Prob. 294 (1954).

costs of radio stations which broadcast the musical compositions.

If the record here furnished any substantial basis for concluding that practical alternatives exist to bulk licensing of recorded music, a different case would be presented. We do not suggest that a private litigant has the burden of conclusively establishing the feasibility of such alternatives. Rather, in the light of the stipulated facts which show the practical need for bulk licensing in order for the market to function (see *supra*, p. 5), petitioner should at least have come forward with evidence demonstrating a reasonable possibility that alternative methods are feasible. That has not been done.

There is no question, of course, that the combination of copyright holders which ASCAP represents requires the closest scrutiny under the antitrust laws. Collective activity necessary for a market to function must go no further than absolutely necessary. For it is only the preservation of the market, not the protection of the copyright privilege, which justifies the combination (cf. *Watson* v. *Buck*, 313 U.S. 387, 404), and it is only for that purpose that the combination is tolerated. Because of the competitive threat represented by ASCAP, the United States sued it under the Sherman Act in 1941 and obtained a consent decree against it. As conditions change [10] or abuses are

[10] For example, the difficult problem of accounting for millions of separate performances each year may ultimately be solved by developments in computer technology. Such a change might warrant a completely new approach to the operation of the market for performance rights to recorded music.

disclosed, it may become necessary, as in 1950 (see, pp. 3-4, *supra*), for the government to seek modifications of that decree or to file suit for additional relief.

Private parties, of course, always have the option of seeking relief in their own behalf, notwithstanding any consent decree accepted by the government. We believe, however, that nothing has been shown on this record to warrant a finding that the antitrust laws have been violated. Accordingly, the court below appears to have reached the correct result.[11]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1967.

[11] What we say here applies only to the record in this case. Other ASCAP licensing activities are not involved and we take no position concerning them.

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